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11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 TERRI SMITH and MICHELE
14 SMITH FREGOSO,

15 Plaintiffs,

16 vs.

17 STONEBRIDGE LIFE
18 INSURANCE COMPANY,

19 Defendant.

Case No. C 08-01466 JCS

Magistrate Judge Joseph C. Spero

OPPOSITION OF DEFENDANT
STONEBRIDGE LIFE INSURANCE
COMPANY TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON PLAINTIFFS' FIRST
CAUSE OF ACTION FOR BREACH
OF CONTRACT

[Filed concurrently with:
(1) Declaration of Cheryl Penner;
(2) Declaration of Joseph E. Laska;
(3) Evidentiary Objections to
Declaration of Michele Smith Fregoso;
and
(4) Evidentiary Objections to
Declaration of John Stennett.]

Hearing Date: September 26, 2008
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Courtroom: A

Action Filed: September 5, 2007

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Stonebridge Life Insurance Company (“Stonebridge”) issued an individual accidental death insurance policy to Diane Geraldine Hall-Hussain, who lived in Eureka, California. On April 9, 2007, Ms. Hall-Hussain was found dead in her apartment. The Humboldt County Coroner’s Office investigated Ms. Hall-Hussain’s death and concluded that she died as a result of an overdose of Oxycodone, a narcotic pain medication prescribed by her physician, Dr. Chia Chen, to treat her chronic pain. It is undisputed that Ms. Hall-Hussain had taken at least 178 Oxycodone pills in less than two weeks, far more than the dosage prescribed by Dr. Chen.

Ms. Hall-Hussain’s daughters and beneficiaries, Plaintiffs Terri Smith and Michele Smith Fregoso (“Plaintiffs”), filed a claim with Stonebridge for accidental death benefits. After conducting a thorough investigation, Stonebridge denied the claim because Ms. Hall-Hussain’s death was excluded from coverage under the policy, which excludes coverage for “Injury that: . . . (3) is caused by or results from . . . taking or using any narcotic, barbiturate or any other drug unless taken or used as prescribed by a Physician,” or “(7) is due to disease, bodily or mental infirmity, or medical or surgical treatment of these.”

Plaintiffs filed this lawsuit against Stonebridge alleging breach of contract and breach of the implied covenant of good faith and fair dealing. Now Plaintiffs ask this Court to grant partial summary judgment in their favor on their First Cause of Action for Breach of Contract. Plaintiffs’ Motion fails on multiple levels.

First, Plaintiffs are not entitled to partial summary judgment on their claim for breach of contract because they have failed to carry their burden of proving that Ms. Hall-Hussain’s death was “accidental” and therefore covered under the policy. It is undisputed that Ms. Hall-Hussain was an experienced user of narcotic pain medication, that on several occasions Dr. Chen discussed with Ms. Hall-Hussain

1 the risks of taking Oxycodone and the necessity of not exceeding the prescribed
 2 dosage, and that Ms. Hall-Hussain indicated to Dr. Chen that she understood these
 3 instructions. Yet it is also undisputed that, despite knowledge of these risks, Ms.
 4 Hall-Hussain voluntarily ingested at least 178 Oxycodone pills in 13 days—nearly
 5 double the dosage prescribed by Dr. Chen. Moreover, Ms. Hall-Hussain had a
 6 history of depression. On April 3, 2007, just six days before her body was found,
 7 Ms. Hall-Hussain told Dr. Chen that she was feeling depressed. These facts are
 8 more than sufficient to create a genuine issue of material fact regarding whether
 9 Ms. Hall-Hussain’s death was “accidental.”

10 Second, even if Ms. Hall-Hussain’s death were found to be accidental, it is
 11 excluded under the policy’s “medical or surgical treatment” exclusion. It is
 12 undisputed that Ms. Hall-Hussain died from an overdose of Oxycodone, which had
 13 been prescribed by Dr. Chen as treatment for her chronic pain.

14 Third, Ms. Hall-Hussain’s death is also excluded under the separate policy
 15 exclusion for drugs taken other than “as prescribed by a Physician.” It is
 16 undisputed that in the days before Ms. Hall-Hussain’s death, she greatly exceeded
 17 the dosage of Oxycodone prescribed by Dr. Chen.

18 For these reasons, discussed in detail below, Stonebridge respectfully
 19 requests that the Court deny Plaintiffs’ Motion.¹

20 **II. STATEMENT OF FACTS**

21 **A. The Policy**

22 Stonebridge issued Accidental Death and Dismemberment Policy
 23 No. 72A45PO585 to Ms. Hall-Hussain effective November 7, 2005 (the “Policy”).²
 24 (Undisputed Fact (“UF”) 1.) The Policy provides accidental death benefits in the
 25 amount of \$50,000 in the event of an accidental death covered under the terms of

26 ¹ Because Ms. Hall-Hussain’s death is excluded under these policy exclusions as a
 27 matter of law, Stonebridge has filed its own Motion for Partial Summary Judgment
 on Plaintiffs’ First Cause of Action for Breach of Contract on these grounds.

28 ² The Policy was issued by J.C. Penney Life Insurance Company, which is now
 known as Stonebridge. (Declaration of Cheryl Penner (“Penner Decl.”) at ¶ 3.)

1 the Policy. (UF 4.)

2 The Policy contains the following provisions:

3 No benefit shall be paid for injury that:

4 * * *

5 3. is caused by or results from the Covered Person's
6 taking or using any narcotic, barbiturate or any other drug
unless taken or used as prescribed by a Physician;

7 * * *

8 7. is due to disease, bodily or mental infirmity, or
9 medical or surgical treatment of these.

10 (Stipulation Authenticating Exhibits ("SAE"), Exhibit A at p. 5.)³

11 The Policy issued to Ms. Hall-Hussain is policy form number D454R.
12 (Penner Decl. at ¶ 5 and Exhibit 1; *see also* SAE, Exhibit A.) The California
13 Insurance Commissioner approved the language of policy form D454R on May 30,
14 2001. (Penner Decl. at ¶¶ 3-4 and Exhibit 2.)

15 **B. Ms. Hall-Hussain's long history with Oxycodone**

16 Between July 7, 2004 and the date of Ms. Hall-Hussain's death, her primary
17 physician was Dr. Chia Chen. (Declaration of Joseph E. Laska ("Laska Decl."),
18 Exhibit 1 at 18:25-19:4.) Dr. Chen testified that Ms. Hall-Hussain had taken
19 various narcotic painkillers since at least 1999. (*Id.* at 34:15-23.) Dr. Chen
20 prescribed OxyContin⁴ for Ms. Hall-Hussain on a monthly basis from April 21,
21 2005 through the date of her death to treat her "intractable pain." (*Id.* at 24:9-25,
22 42:11-43:1; UF 15) OxyContin is a narcotic painkiller used to treat pain. (UF 12.)

23 Taking narcotic painkillers such as OxyContin involves certain risks,
24 including the risk of overdose. (Laska Decl., Exhibit 1 at 31:25-32:14.) On
25 numerous occasions, Dr. Chen discussed with Ms. Hall-Hussain the risks associated

26 ³ The Stipulation Authenticating Exhibits, along with the Joint Statement of
27 Undisputed Facts, was filed concurrently with the parties' cross-motions.

28 ⁴ OxyContin is a brand-name drug; Oxycodone is the generic equivalent. (UF 12.)
The two terms are used interchangeably throughout this Motion.

1 with taking OxyContin, including the risk of overdose. (*Id.* at 32:25-34:6.)

2 Ms. Hall-Hussain indicated to Dr. Chen that she understood these risks. (*Id.* at
3 35:4-9, 35:24-36:3.)

4 Dr. Chen also instructed Ms. Hall-Hussain not to increase the dosage of
5 OxyContin without her consent. (*Id.* at 36:4-7.) Ms. Hall-Hussain indicated to
6 Dr. Chen that she understood that she was not supposed to take more OxyContin
7 than the prescribed amount. (*Id.* at 37:2-7.)

8 In addition, Ms. Hall-Hussain had a history of depression. (Laska Decl.,
9 Exhibit 1 at 58:1-19.) On April 3, 2007, six days before Ms. Hall-Hussain's body
10 was discovered, she told Dr. Chen that "[s]he feels depressed because of pain and
11 doesn't want to bother [with her blood glucose]." (SAE, Exhibit D at p. 16; Laska
12 Decl., Exhibit 1 at 57:4-25.)

13 **C. Ms. Hall-Hussain's death**

14 Ms. Hall-Hussain was found dead in her residence on April 9, 2007. (UF 5.)
15 Her death was investigated by Humboldt County Deputy Coroner Roy Horton, who
16 prepared a Death Investigation Report detailing his findings. (UF 6-7.) Based on
17 his investigation, the Deputy Coroner believes that Ms. Hall-Hussain died on the
18 evening of April 8, 2007. (Laska Decl., Exhibit 2 at 60:5-24.) As the Deputy
19 Coroner detailed in the Death Investigation Report:

20 I went inside the apartment where I located the decedent
21 in the one and only bedroom. The decedent was dressed
22 in a nightgown, sitting in the prayer position along side
23 the bed. * * * I located several medications in the room.
24 The decedent was being seen by Dr. Chen. One bottle
25 had contained 180 Oxycontin that was 40 mg each. The
26 prescription had been received on March 27, 2007. The
27 bottle only had one tablet remaining [on April 9]. I also
28 found one Oxycontin tab on the bed that had been spilled
out of the opened bottle. The Oxycontin bottle was the
only medication bottle that was lying on the bed.

(SAE, Exhibit B at p. 9.)

27 The label on the bottle, which had contained 180 40mg OxyContin pills on
28 March 27, 2007, states: "Take one to two tablets by mouth every eight hours."

(Laska Decl., Exhibit 2 at 28:5-29:21.) Only two pills remained, and Deputy Coroner Horton found no other OxyContin pills in Ms. Hall-Hussain's apartment. (SAE, Exhibit B at p. 9; Laska Decl., Exhibit 2 at 29:25-31:6.)

Deputy Coroner Horton drew postmortem blood from Ms. Hall-Hussain and sent it to Central Valley Toxicology for a drug and alcohol screen. (SAE, Exhibit B at p. 9; Laska Decl., Exhibit 2 at 37:5-9.) The Toxicology Report prepared by Central Valley Toxicology was made a part of the Death Investigation Report. (SAE, Exhibit B at p. 9; Laska Decl., Exhibit 2 at 37:10-14.) According to the Toxicology Report, the effective range for Oxycodone is 0.005 to 0.05 mg/L, while the potentially toxic range for Oxycodone begins at 0.2 mg/L. (SAE, Exhibit B at p. 11.) The Oxycodone level in Ms. Hall-Hussain's blood was 0.25 mg/L—in the potentially toxic range. (*Id.*) In the Death Investigation Report, Deputy Coroner Horton concluded that the cause of Ms. Hall-Hussain's death was Oxycodone intoxication. (SAE, Exhibit B at p. 10; Laska Decl., Exhibit 2 at 43:18-23.)

Deputy Coroner Horton completed Ms. Hall-Hussain's Death Certificate. (SAE, Exhibit B at p. 14; Laska Decl., Exhibit 2 at 47:23-48:7.) The final Death Certificate, issued on April 26, 2007, listed the immediate cause of Ms. Hall-Hussain's death as "Oxycodone Intoxication." (UF 8.) The Death Certificate also states that the manner of death was "accidental" and that "Decedent took an accidental overdose of Oxycodone." (UF 9-10.)

D. It is undisputed that Ms. Hall-Hussain took far more Oxycodone than Dr. Chen prescribed

The OxyContin bottle found on Ms. Hall-Hussain's bed had contained 180 40mg OxyContin pills and had been filled on March 27, 2007. (Laska Decl., Exhibit 2 at 28:5-29:21.) The bottle reflected the following dosage: "Take one to two tablets by mouth every eight hours." (*Id.*) Dr. Chen saw Ms. Hall-Hussain on April 3, 2007, and at that time increased the dosage of OxyContin from two 40mg pills three times per day to three 40mg pills three times per day. (Laska Decl.,

Exhibit 1 at 48:7-49:12.) Based on his investigation, the Deputy Coroner believes that Ms. Hall-Hussain died on the evening of April 8, 2007. (Laska Decl., Exhibit 2 at 60:5-24.)

Even accounting for the increased dosage on April 3, 2007, Ms. Hall-Hussain took far more Oxycodone than Dr. Chen had prescribed:

- When Ms. Hall-Hussain filled her last Oxycodone prescription on March 27, 2007, the dosage was “one to two tablets . . . every eight hours.” If she filled the prescription first thing in the morning on March 27, 2007 and took the maximum dosage of six tablets in every 24-hour period during the seven days between March 27, 2007 and April 2, 2007 (the day before her appointment with Dr. Chen), she should have taken a maximum of 42 pills during that period.
- On April 3, 2007, Dr. Chen instructed Ms. Hall-Hussain to increase the dosage of Oxycodone to three pills every eight hours. If Ms. Hall-Hussain took the maximum of nine pills in every 24-hour period during the six days between April 3, 2007 and her death on April 8, 2007, she should have taken a maximum of 54 pills during that period.
- Thus, if Ms. Hall-Hussain had taken the maximum dosage of Oxycodone prescribed by Dr. Chen between March 27, 2007 and her death on April 8, 2007, she should have taken no more than 96 pills. Instead, she took at least 178 of the 180 pills in the bottle—nearly *double* the prescribed amount.

E. Stonebridge denied Plaintiffs’ claim because it is excluded from coverage.

Plaintiffs submitted a claim for accidental death benefits on April 27, 2007. (UF 17.) Plaintiffs are the beneficiaries of the Policy in equal shares. (UF 18.)

Stonebridge conducted an investigation, which included contacting the Humboldt County Coroner, Dr. Chen and Lima Pharmacy, and requesting and receiving from each the records pertaining to Ms. Hall-Hussain. Stonebridge also telephoned the Deputy Coroner and received additional information regarding the

1 circumstances of Ms. Hall-Hussain's death.

2 Based on its investigation, Stonebridge concluded that Ms. Hall-Hussain's
3 death was excluded from coverage under two separate exclusions in the Policy:
4 "No benefit shall be paid for Injury that: . . . (3) is caused by or results from . . .
5 taking or using any narcotic, barbiturate or any other drug unless taken or used as
6 prescribed by a Physician," and "(7) is due to disease, bodily or mental infirmity, or
7 medical or surgical treatment of these." On June 12, 2007, Stonebridge sent a letter
8 to Plaintiffs denying their claim based on Stonebridge's claims investigation and
9 the two Policy exclusions. (UF 19.)

10 Plaintiffs sent a letter to Stonebridge dated July 20, 2007 asking it to
11 reconsider its denial of their claim. (SAE, Exhibit F.) No additional documents or
12 information was submitted by Plaintiffs. (*Id.*) Stonebridge reconsidered its denial
13 and, by letter dated August 9, 2007, Stonebridge affirmed its denial of Plaintiffs'
14 claim. (SAE, Exhibit G.)

15 **F. Plaintiffs' lawsuit against Stonebridge**

16 On September 5, 2007, Plaintiffs filed their lawsuit against Stonebridge
17 alleging breach of contract and breach of the implied covenant of good faith and
18 fair dealing. Plaintiffs allege, among other things, that Stonebridge "claimed that
19 decedent had taken more Oxycodone than was prescribed by her physician.
20 However, the facts disclose that decedent had taken her medication exactly as
21 prescribed by her physician." (Complaint at ¶ 13.) Plaintiffs also allege that
22 Stonebridge wrongly relied on the exclusion for "medical or surgical treatment"
23 because "the use of pain medication was not a treatment of a medical condition but
24 rather an attempt to mask the pain associated therewith." (Complaint at ¶ 17.)
25
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1 **III. ARGUMENT**

2 **A. Plaintiffs are not entitled to partial summary judgment because** 3 **they have failed to carry their burden of proving that Ms. Hall-** 4 **Hussain's death was "accidental."**

5 In their Motion, Plaintiffs acknowledge that it is their burden to prove that
 6 Ms. Hall-Hussain's death was a covered "accident" under the Policy. (Motion at
 7 6:28-7:2.) Thus, to be entitled to summary judgment on their breach of contract
 8 claim, Plaintiffs must show that there is no genuine issue of material fact that
 9 Ms. Hall-Hussain's death was accidental.

10 Plaintiffs have failed to satisfy their burden. It is undisputed that Ms.
 11 Hall-Hussain was an experienced user of narcotic pain medication. It is also
 12 undisputed that on numerous occasions Dr. Chen discussed the risks of taking
 13 Oxycodone with Ms. Hall-Hussain and instructed her not to take more than the
 14 prescribed dosage, and that Ms. Hall-Hussain indicated to Dr. Chen that she
 15 understood those risks and instructions. It is further undisputed that, despite
 16 knowledge of those risks, Ms. Hall-Hussain intentionally took at least 178
 17 Oxycodone pills in 13 days, effectively doubling the prescribed dosage during that
 18 period.

19 In addition, Dr. Chen confirmed that Ms. Hall-Hussain had a history of
 20 depression. (Laska Decl., Exhibit 1 at 58:1-19.) In fact, Ms. Hall-Hussain's
 21 medical records indicate that on April 3, 2007—five days before her death—she
 22 told Dr. Chen that "[s]he feels depressed because of pain and doesn't want to bother
 23 [with her blood glucose]." (SAE, Exhibit D at p. 16; Laska Decl., Exhibit 1 at
 24 57:4-25.)

25 Based on these uncontroverted facts, a rational trier of fact could determine
 26 that Ms. Hall-Hussain was either suicidal or indifferent to whether she lived or died.
 27 Even if the trier of fact were to determine that Ms. Hall-Hussain did not
 28 subjectively expect to die after taking such a large overdose of narcotics, it may
 also determine that her expectations were objectively unreasonable.

1 In support of their Motion, Plaintiffs submit a declaration from Plaintiff
 2 Michele Smith Fregoso discussing Ms. Hall-Hussain's interests and her relationship
 3 with certain family members. To the extent that this testimony is designed to show
 4 that Ms. Hall-Hussain's death "was purely accidental" as Plaintiffs suggest (Motion
 5 at 7:11-12), it is inadmissible because it is speculative and lacks foundation.

6 Plaintiffs also point out that the Deputy Coroner determined that the death
 7 was not suicide. During deposition, the Deputy Coroner testified that his
 8 conclusion was based on three factors: (1) the absence of a suicide note; (2) his
 9 conversations with Ms. Hall-Hussain's family; and (3) that the Oxycodone level in
 10 Ms. Hall-Hussain's blood, though well within the toxic range, was not higher.
 11 (Motion at 5:6-15.) Each of these factors is questionable. One, the Deputy Coroner
 12 conceded that suicide notes are present in only half of the cases ultimately ruled to
 13 be suicide. (Laska Decl., Exhibit 2 at 65:7-13.) Two, no one (not even Dr. Chen)
 14 informed the Deputy Coroner that Ms. Hall-Hussain had a history of depression.
 15 (*Id.* at 47:19-22.) Three, the Deputy Coroner admitted that he is not a toxicologist
 16 and that he had no way of evaluating what the levels of Oxycodone in Ms.
 17 Hall-Hussain's blood should have been, given that she had died hours before she
 18 was found, that drugs have half-lives, and that the effect of death on blood levels is
 19 "debatable" even by toxicologists. (*Id.* at 65:25-67:5.) In any event, the Death
 20 Certificate is not conclusive as to the cause of Ms. Hall-Hussain's death. *Heighley*
 21 *v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1256 n.12 (C.D. Cal. 2003) ("a
 22 death certificate is 'subject to rebuttal and to explanation'"), *quoting Morris v.*
 23 *Noguchi*, 141 Cal. App. 3d 520, 523 n.1 (1983).

24 In sum, the evidence submitted by Plaintiffs does not satisfy their difficult
 25 summary judgment burden, especially in light of the facts regarding Ms.
 26 Hall-Hussain's depression and the number of pills taken. At most, it creates a
 27 triable issue of fact that renders summary judgment inappropriate.
 28

1 **B. Plaintiffs are not entitled to partial summary judgment because**
 2 **Ms. Hall-Hussain's death was the result of medical treatment and**
 3 **is excluded under the Policy.**

4 Plaintiffs' Motion fails because Ms. Hall-Hussain's death is excluded under
 5 the Policy's "medical or surgical treatment" exclusion. It is undisputed that the
 6 Policy excludes death "due to disease, bodily or mental infirmity, or *medical or*
 7 *surgical treatment* of these." (SAE, Exhibit A at p. 5 (emphasis added).) It is also
 8 undisputed that Ms. Hall-Hussain died from an overdose of Oxycodone, which Dr.
 9 Chen prescribed to treat Ms. Hall-Hussain's intractable pain:

9 Q. [W]hat was the reason that you prescribed the
 10 oxycodone for Ms. Hall-Hussain?

11 A. For intractable pain.

12 Q. And you prescribed the OxyContin *to treat the*
 13 *intractable pain*?

14 A. *Right.*

15 (Laska Decl., Exhibit 1 at 24:6-11 (emphasis added).)

16 It does not appear that California state courts have specifically examined
 17 whether a death caused by an overdose of prescription medication falls within the
 18 "medical or surgical treatment" exclusion. But the Ninth Circuit has examined a
 19 similar issue under Idaho law and found the death to be excluded. *Wilson v.*
 20 *Business Men's Assurance Co.*, 181 F.2d 88, 90 (9th Cir. 1950) (holding death by
 21 adverse reaction to hospital-administered sedatives to be excluded under accidental
 22 death policy's medical treatment exclusion).

23 Courts in other jurisdictions have uniformly found accidents caused by
 24 overdoses of prescription medication to be excluded under medical treatment
 25 exclusions. *Barkerding v. Aetna Life Ins. Co.*, 82 F.2d 358, 359 (5th Cir. 1936)
 26 (analogizing injury by excessive heat treatment to overdose: "The excess of heat is
 27 like an overdose of a prescribed drug ignorantly taken by a patient, the effect of
 28 which is held to be the result of medical treatment under policies such as this
 one."), *citing New Amsterdam Cas. Co. v. Perryman*, 162 Miss. 864 (1932)

(paralysis as a result of overdose of quinine taken in twice the dosage recommended by physician was excluded by accident insurance policy's medical treatment exclusion); *Bayless v. Travelers Ins. Co.*, 2 Fed. Cas. 1077 (E.D.N.Y. 1877), *rev'd on other grounds*, 113 U.S. 316 (1885) (insured's death from inadvertent overdose of opium prescribed by physician in proper doses fell within accident insurance policy's medical treatment exclusion). *See also Order of the United Commercial Travelers of America v. Shane*, 64 F.2d 55, 59-60 (8th Cir. 1933) ("If the administering of the drug in the case at bar did not constitute medical or surgical treatment, we should be at a loss how to classify such act.").

In their Complaint, Plaintiffs allege that this exclusion does not apply because "the use of pain medication was not a treatment of a medical condition but rather an attempt to mask the pain associated therewith." (Complaint at ¶ 17.) In their Motion, Plaintiffs have abandoned this allegation and now argue that this exclusion "does not apply because decedent did not die as a result of treatment but rather died as a result of an accidental overdoes [sic] of Oxycodone—a negligent act resulting in death." (Motion at 10:8-9.) This proposition, if accepted, would effectively void the exclusion. Not surprisingly, none of the three cases cited by Plaintiffs supports this proposition. The first case, *Heighley*, 257 F. Supp. 2d 1241, did not involve a "medical or surgical treatment" exclusion and is not even remotely on point. The other two cases—*Bornstein v. J.C. Penney Life Ins. Co.*, 946 F. Supp. 874 (C.D. Cal. 1996) and *Chale v. Allstate Life Ins. Co.*, 353 F.3d 742 (9th Cir. 2003)—do involve a similar exclusion for disease and medical treatment. But those courts were concerned with the "disease" prong (rather than the "treatment" prong) and analyzed whether the insured's disease was sufficient to exclude the insured's death from coverage when the death resulted in part from factors unrelated to the insured's medical history. Here, in contrast, there is no dispute that the medical treatment—Ms. Hall-Hussain's use of Oxycodone—was

1 the cause of her death.⁵

2 Ms. Hall-Hussain's death by Oxycodone intoxication is excluded under the
3 Policy's "medical or surgical treatment" exclusion. Plaintiffs do not and cannot cite
4 any authority suggesting otherwise. As a result, Plaintiffs are not entitled to partial
5 summary judgment on their breach of contract claim.

6 **C. Plaintiffs are not entitled to partial summary judgment because**
7 **Ms. Hall-Hussain's death was caused by taking more Oxycodone**
8 **than prescribed by her physician and is excluded under the Policy.**

9 Plaintiffs' Motion fails on the separate and independent ground that Ms.
10 Hall-Hussain's death is excluded under the Policy's "drug" exclusion. It is
11 undisputed that the Policy excludes death that "is caused by or results from the
12 Covered Person's taking or using any narcotic, barbiturate or any other drug *unless*
13 *taken or used as prescribed by a Physician.*" (SAE, Exhibit A at p. 5 (emphasis
14 added).) It is also undisputed that Ms. Hall-Hussain died from an overdose of
15 Oxycodone after taking at least 178 pills in 13 days, while the maximum prescribed
16 dosage during that period was 96 pills.

17 When Ms. Hall-Hussain took twice as many Oxycodone pills as prescribed
18 by Dr. Chen, she did not take the drug "as prescribed by a Physician." Her death is
19 therefore excluded from coverage under the Policy.

20 In their Motion, Plaintiffs do not dispute these facts. Nor do Plaintiffs appear
21 to dispute that their claim for benefits is precluded under the Policy's exclusionary
22 language. Instead, Plaintiffs argue that the exclusionary language should be read
23 out of the Policy and replaced with statutory language that, according to them, is
24 broader and does not preclude their claim. As set forth below, Plaintiffs' argument
25 fails on every level.

26 ⁵ There are other reasons why *Bornstein* and *Chale* should not be relied on by this
27 Court. *Bornstein* was expressly overruled (albeit on other grounds) by the Ninth
28 Circuit in *Khatchatrian v. Continental Cas. Co.*, 332 F.3d 1227, 1229 (9th Cir.
2003). And *Chale*, though a Ninth Circuit case, originated in the Oregon District
Court and applies Oregon law, which differs significantly from California law.

1 **1. The Policy’s “drug” exclusion is valid and enforceable.**

2 Plaintiffs argue that the Policy’s “drug” exclusion should be replaced by the
3 following language from the California Insurance Code:

4 Intoxicants and controlled substances: The insurer shall
5 not be liable for any loss sustained or contracted in
6 consequence of the insured’s being intoxicated or under
the influence of any controlled substance *unless*
administered on the advice of a physician.

7 Cal. Ins. Code § 10369.12 (emphasis added). This language is found in Section
8 10369 *et seq.*,⁶ which provides a list of “optional” policy provisions that insurers
9 may include in group disability policies. Section 10369.1 provides:

10 Except as provided in Section 10323, no disability policy
11 delivered or issued for delivery to any person in this State
12 shall contain provisions respecting the matters set forth in
13 Sections 10369.2 to 10369.12, inclusive, unless such
14 provisions are in the words in which the same appear in
15 such sections; *provided, however*, that the insurer may, at
its option, use in lieu of any such provision a
corresponding provision of different wording approved by
the commissioner, which is not less favorable in any
respect to the insured or the beneficiary.

16 Cal. Ins. Code § 10369.1 (emphasis added).⁷

17 According to Plaintiffs, the Policy language “unless taken or used as
18 prescribed by a Physician” is less favorable to them than the statutory language
19 “unless administered on the advice of a physician,” so the Policy language must be
20 replaced by the statutory language. And, according to Plaintiffs, the allegedly more
21 favorable statutory language does not exclude Ms. Hall-Hussain’s death from
22 coverage.

23 Plaintiffs’ allegations fail because the Insurance Code provisions they rely on
24 apply only to group disability policies, not to individual accidental death policies
25 like this Policy. Even if those provisions were applicable to this Policy, the
26 language in the Policy is valid and enforceable because it has been approved by the

27 ⁶ All references are to the California Insurance Code unless otherwise specified.

28 ⁷ Accidental death insurance is classified as disability insurance in California.
Cal. Ins. Code § 106.

1 California Insurance Commissioner. And even if the provisions cited by Plaintiffs
 2 did apply and the Policy was rewritten as Plaintiffs suggest, Ms. Hall-Hussain's
 3 death would still be excluded from coverage because her excessive use of
 4 Oxycodone was contrary to her physician's advice.

5 a. Section 10369 applies only to group disability policies
 6 and not to individual accidental death policies like the one
 7 in this case.

8 Section 10369.1 *et seq.* is found in Article 5 of Chapter 4 of the Insurance
 9 Code. Section 10270 (titled "Scope of Chapter") specifies the types of insurance
 10 subject to the provisions of Chapter 4. It includes "selected group disability
 11 insurance" as well as certain enumerated categories of insurance covering more
 12 than one person (such as, for example, "blanket insurance" and "tuition refund
 insurance").

13 But *individual* disability policies—including individual accidental death
 14 policies like the one in this case—are *not* subject to the provisions of Chapter 4.
 15 Cal. Ins. Code § 10270; *accord*, Croskey, et al., *California Practice Guide:*
 16 *Insurance Litigation*, § 6:479 (Rutter 2008) ("*Compare—group policies: Special*
 17 *doctrines apply to accidental death benefits payable under group insurance*
 18 *policies*"; and then citing to Section 10270 and Section 10369.1 as examples).

19 The Policy issued to Ms. Hall-Hussain was an individual accidental death
 20 policy. (SAE, Exhibit A; Penner Decl. at ¶ 5.) It is not a group disability policy.
 21 Therefore, it is not subject to the provisions of Chapter 4 of the Insurance Code,
 22 including Section 10369.12.

23 b. The policy form in this case was approved by the
 24 California Insurance Commissioner.

25 Even if Chapter 4 of the Insurance Code were construed to apply to
 26 individual accidental death policies, the language of Section 10369.12 still would
 27 not be read into the Policy because the Policy's language—including the "drug"
 28 exclusion—was approved by the California Insurance Commissioner. The Policy

1 issued to Ms. Hall-Hussain is form D454R, which was specifically approved by the
 2 Commissioner on May 30, 2001. (Penner Decl. at ¶¶ 3-5 and Exhibit 2; *see also*
 3 SAE, Exhibit A.)

4 Section 10369.1 provides that “the insurer may, at its option, use in lieu of
 5 any such provision a corresponding provision of different wording approved by the
 6 commissioner, which is not less favorable in any respect to the insured or the
 7 beneficiary.” The Policy’s “drug” exclusion applies because it was approved by the
 8 Commissioner and (as discussed below in Section (c)) is not less favorable than the
 9 language in Section 10369.12.

10 Plaintiffs contend that the language in Section 10369.12 is more favorable
 11 than the Policy’s “drug” exclusion. But the Policy language will nevertheless stand
 12 under a separate provision of the Insurance Code. Section 10369.1 expressly
 13 applies only “[e]xcept as provided in Section 10323” Cal. Ins. Code
 14 § 10369.1. Section 10323, in turn, provides that “with the approval of the insurance
 15 commissioner,” any statutory language in Article 4 (including Section 10369.1 *et*
 16 *seq.*) may be modified if it is “inconsistent with the coverage provided by a
 17 particular form or policy.” Cal. Ins. Code § 10323. To the extent that the “on the
 18 advice of a physician” language in Section 10369.12 may be construed in the
 19 manner Plaintiffs suggest—that is, to cover a death caused by an overdose of
 20 prescription narcotics *intentionally* taken contrary to a physician’s advice—it is
 21 inconsistent with the accidental death coverage provided under the Policy.

22 c. The Policy language is not “less favorable” to Plaintiffs
 23 than the optional statutory language on these facts.

24 Plaintiffs’ Complaint largely rests on their allegations that the Policy
 25 language “unless taken or used as prescribed by a Physician” is less favorable than
 26 the statutory language “unless administered on the advice of a physician,” and that
 27 Ms. Hall-Hussain’s death should be covered under the latter provision. No
 28 California court appears to have addressed this issue. But the Sixth Circuit recently

1 did, and it interpreted the “on the advice of a physician” language to *exclude* deaths
 2 caused by an overdose of prescription medication. *Dice v. General Electric Capital*
 3 *Assurance Co.*, 93 Fed. Appx. 68 (6th Cir. 2004) (not officially published).

4 In *Dice*, the insured’s doctor prescribed a maximum of six 40mg Oxycodone
 5 tablets, or a total of 240 milligrams, every 24 hours. The insured’s postmortem
 6 toxicology report showed that the insured had the equivalent of 300mg of
 7 Oxycodone in her blood, more than the prescribed dosage. Her life insurance
 8 policy excluded death caused by taking drugs “unless administered on the advice of
 9 a physician.” *Id.* at 69. The Sixth Circuit affirmed the District Court’s entry of
 10 summary judgment for the insurer and ruled that the insured’s death was caused by
 11 ingesting more Oxycodone than her physician had prescribed and was excluded
 12 under the policy:

13 Brenda ingested more Oxycontin than her physician had
 14 prescribed or advised that she ingest and such ingestion,
 15 either alone or in combination with some of the other
 16 drugs found in her blood, caused her death. Under these
 17 circumstances, Oxycontin was not administered on the
 18 advice of Brenda’s physician. Because Brenda’s death
 19 resulted from her being under the influence of at least one
 20 drug that was not administered on the advice of a
 21 physician, the policy exclusion is applicable

22 *Id.* at 70 (emphasis added).

23 d. *Hummel* does not help Plaintiffs.

24 Plaintiffs pin their hopes on *Hummel v. Continental Casualty Insurance*
 25 *Company*, 254 F. Supp. 2d 1183, 1189 (D. Nev. 2003) (holding that a similar—but
 26 not identical—policy exclusion for drugs “administered on the advice of a
 27 physician” was more favorable to the insured than an exclusion for drugs taken “as
 28 prescribed by a physician” and did not exclude death caused by an overdose of
 prescription Oxycodone). At first blush, *Hummel* appears to be on point. But a
 closer reading of the case reveals that Plaintiffs’ hopes are misplaced. *Hummel* is
 not binding, is distinguishable, and is poorly reasoned.

1 (1) Hummel is not binding.

2 *Hummel* is a Nevada District Court case interpreting the Nevada Insurance
3 Code. It is not binding on this Court. And it should not be considered persuasive
4 authority because it does not involve California law or the provisions of the
5 California Insurance Code at issue in this case. In fact, the *Hummel* court expressly
6 based its decision on its perception of the intent of the Nevada Legislature and on
7 Nevada laws of statutory construction, *id.* at 1188-90, neither of which guides this
8 Court.⁸

9 (2) Hummel is distinguishable.

10 *Hummel* is distinguishable on two crucial grounds.

11 First, like Chapter 4 of the California Insurance Code, the provisions of the
12 Nevada Insurance Code at issue in *Hummel* apply only to certain types of insurance
13 policies. In Nevada, however, the distinction is not between individual and group
14 disability policies (as in this case) but between group and franchise policies. In
15 *Hummel*, the court agreed with the plaintiff that the policy in question was a
16 franchise policy and that the statutes in question applied. Here, in contrast,
17 Sections 10369.1 and 10369.12 do not apply to Ms. Hall-Hussain's individual
18 accidental death Policy because they are found in Chapter 4 of the Insurance Code,
19 which expressly applies only to certain types of group disability policies.

20 Second, like the statutory "drug" exclusion in Section 10369.12, the statutory
21 exclusion at issue in *Hummel* could be replaced by the insurer with "a
22 corresponding provision of different wording approved by the commissioner which
23 is not less favorable in any respect to the insured or the beneficiary." *Id.* at 1188,
24 quoting Nev. Rev. Stat. § 689A.180. In *Hummel*, however, the court noted that the
25 parties had not submitted any evidence regarding whether the policy had been
26 approved by the Nevada Insurance Commissioner. *Id.* at 1188 n.2. But here, the

27
28 ⁸ Plaintiffs provide only a partial citation to *Hummel* that is misleading and neglects
to inform the Court that *Hummel* is a Nevada case. (Motion at 9:14-15.)

1 California Insurance Commissioner approved the Policy's drug exclusion on May
2 30, 2001.

3 (3) Hummel is poorly reasoned.

4 The *Hummel* decision is poorly reasoned. The *Hummel* court began by
5 holding the language "administered on the advice of a physician" to be ambiguous.
6 But in *Dice*, the Sixth Circuit had no trouble interpreting the plain language of such
7 an exclusion and finding that it excluded a death where the insured took more
8 medication than her doctor had advised. *Dice*, 93 Fed. Appx. at 70.

9 Having determined (wrongly) that the language "administered on the advice
10 of" was ambiguous, the *Hummel* court then attempted to divine the legislature's
11 intent and found that the plaintiff's narrower interpretation of the language was
12 "more in line with the policy behind the statute, namely, protecting insureds." 254
13 F. Supp. 2d at 1190. But the court continued:

14 Nor does [the plaintiff's interpretation] achieve the absurd
15 results that Continental asserts, specifically, that Nevada's
16 insurance law would allow an insured to take unlimited
17 quantities of prescribed medications and still be afforded
18 coverage under the policy as insurance companies are not
19 without means to protect themselves from risks arising
20 from intentional overdoses. Moreover, contrary to
21 Continental's position, it is the clause "taken as
prescribed by" that could very well lead to absurd results.
For instance, if Erica had taken three Oxycodone pills in
one day as opposed to two, and suffered some unforeseen
[sic] negative reaction resulting from the additional
medication, which in turn resulted in injury or loss,
Continental would be free to deny her coverage based on
her failure to adhere strictly to her physicians instructions.

22 *Id.* This passage exposes the court's flawed reasoning.

23 The court insisted that its holding would not "achieve the absurd result[] . . .
24 that Nevada's insurance law would allow an insured to take unlimited quantities of
25 prescribed medications and still be afforded coverage under the policy." *Id.* Yet
26 that is exactly what the decision did. In *Hummel*, it was undisputed that the insured
27 had intentionally taken far more Oxycodone than had been prescribed by her
28 physician, yet the court determined that her death was covered despite the statutory

1 exclusion.

2 The court also justified its holding on the ground that “insurance companies
3 are not without means to protect themselves from risks arising from intentional
4 overdoses.” That is true, but insurance companies protect themselves against such
5 risks *by inserting exclusions in their policies*. That is exactly what the insurer in
6 *Hummel* had tried to do, but the court wrote the exclusion out of the policy. If the
7 *Hummel* court was thinking of other ways in which insurers could exclude losses
8 other than through policy exclusions, it did not identify them.

9 The court then suggested that it was the insurer’s proposed construction—
10 that is, that the “administered on the advice of” language should exclude deaths
11 when insureds do not “adhere strictly” to their doctors’ instructions—that “could
12 very well lead to absurd results.” *Id.* But Oxycodone is a narcotic painkiller that
13 comes with significant risks. As is apparent from the number of cases involving
14 deaths caused by overdoses of Oxycodone, it is a dangerous drug if not taken
15 exactly as prescribed. Insurers are entitled to protect themselves against such risks.

16 The *Hummel* court was preoccupied with a hypothetical in which the insured
17 might take one extra pill, but this case presents a very different (and very real)
18 scenario. Here, Dr. Chen discussed with Ms. Hall-Hussain the risks of taking
19 Oxycodone and the importance of not exceeding the prescribed dosage. Yet Ms.
20 Hall-Hussain chose to ignore Dr. Chen’s instructions and take over 80 extra pills at
21 the cost of her life. Stonebridge did not accept such a risk and is entitled to exclude
22 it from coverage.

23 Finally, the *Hummel* court concluded by stating: “It is more reasonable to
24 assume that the purpose of the statute’s language was to prevent the exclusion from
25 applying in cases where the consumption of the drug or narcotic was itself an illegal
26 act.” Even if the court had been entitled to base its statutory interpretation on what
27 it merely *assumed* the legislature to have meant, there is no basis for the court’s
28 assumption. The Nevada Legislature, like the California Legislature, knows how to

1 draft statutes involving illegal conduct. If either had intended to permit insurers to
 2 exclude only those deaths caused by using illegal drugs, it could have easily drafted
 3 the statute as such. Instead, both legislatures permitted insurers to exclude deaths
 4 occurring when insureds do not use medication “on the advice of a physician.”

5 In sum, this Court should not be guided by *Hummel* in this case.

6 e. *Legare* does not help Plaintiffs either.

7 Plaintiffs also ask this Court to rely on the unpublished “Findings of Fact and
 8 Conclusions of Law” from a case their attorneys litigated years ago in the Southern
 9 District of California: *Legare v. Canada Life Assurance Co.* But *Legare* is
 10 distinguishable on several grounds.

11 First, unlike this case, *Legare* involved a group disability policy (which is
 12 subject to Chapter 4 of the California Insurance Code) and does not appear to have
 13 involved policy language that was expressly approved by the California Insurance
 14 Commissioner. Second, contrary to Plaintiffs’ suggestion, *Legare* does not address
 15 “the exact same issue” as this case. (Motion at 9:25.) The *Legare* court considered
 16 an exclusion for loss occurring “while: (1) in the course of operating a motor
 17 vehicle; (a) under the influence of an intoxicant.” (Declaration of John Stennett,
 18 Exhibit 3, at ¶ 11.) This is far broader than the “as prescribed by a physician”
 19 language in Ms. Hall-Hussain’s Policy and, unlike the Policy, is plainly less
 20 favorable to the insured. Third, in *Legare*, the insured died in a car accident with
 21 Soma and Tylenol with Codeine in his system. The court appears to have
 22 considered only whether the insured had a prescription for those drugs and not
 23 whether the insured had used more than had been prescribed.

24 In any event, the Court should not consider the *Legare* order because
 25 Plaintiffs failed to request that the Court to take judicial notice of it as required by
 26 Federal Rule of Evidence 201. Instead, Plaintiffs merely attach the order to their
 27 attorney’s declaration. Because the order is being offered to prove the truth of its
 28 contents, it is inadmissible hearsay. Fed. R. Evid. 801-02.

1 **2. Ms. Hall-Hussain’s death is excluded because her**
 2 **Oxycodone overdose was not “on the advice of a physician.”**

3 Even if this Court were to find that the Policy language “unless taken or used
 4 as prescribed by a Physician” should be replaced by the statutory language “unless
 5 administered on the advice of a physician,” Plaintiffs’ claim still fails. When Ms.
 6 Hall-Hussain chose to take over 80 more Oxycodone pills than Dr. Chen had
 7 prescribed, she did not take them “on the advice of” Dr. Chen. Indeed, she took
 8 them contrary to Dr. Chen’s express instructions.

9 **D. Plaintiffs’ Motion was untimely.**

10 On July 21, 2008, this Court approved the parties’ proposed briefing
 11 schedule and ordered the parties to file their cross-motions by August 13, 2008.
 12 Stonebridge complied with the Order, but Plaintiffs did not. On August 14, 2008,
 13 Stonebridge’s counsel informed Plaintiffs’ counsel that Plaintiffs’ Motion had not
 14 been timely filed. (Laska Decl. at ¶ 4.) Nonetheless, Plaintiffs did not file their
 15 Motion until August 15, 2008—two days late. Plaintiffs’ Motion should be denied
 16 as untimely.

1 **IV. CONCLUSION**

2 Ms. Hall-Hussain did not take Oxycodone “as prescribed by” or “on the
3 advice of” her physician. To hold otherwise in this case would render the
4 exclusionary language meaningless. It would also violate public policy and
5 encourage abuse of prescription medication. Because Ms. Hall-Hussain’s death is
6 excluded under the “medical and surgical treatment” exclusion and the “drug”
7 exclusion (regardless of which language is used), Plaintiffs are not entitled to partial
8 summary judgment on their breach of contract claim.

9
10 Dated: August 29, 2008

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